# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

## No. 60

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, ET AL.,
*Appellants,*

*vs.*

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

## SUPPLEMENTAL BRIEF OF RESPONDENTS

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*To the Honorables, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

At the suggestion of the Court during the argument of the above entitled case, counsel for the state of Utah is herewith submitting its supplemental brief covering only

the question of whether or not the Utah conspiracy statute under which the above named appellants were convicted is so broad, indefinite and uncertain as to be in contravention of the Fourteenth Amendment of the Constitution of the United States of America. In submitting a supplemental brief on this point counsel wishes to urge that the point not be considered by the Court at all in determining this case. The point was not raised in the trial court, in the Supreme Court of the state of Utah, nor in this Court either by assignment of error or by argument in the appellant's brief until mentioned from the bench by Mr. Justice Jackson after argument on the case had started. Section VI of Rule 27 of this Court provides in part:

> "Errors not specified according to this rule will be disregarded save that the Court, at its option, may notice a plain error not assigned or specified."

While undoubtedly the Court may under the above rule, at its option, consider this particular point, counsel wish to urge that the fundamental equities of the case require that it do not.

Certainly the trial court and the Supreme Court of the State of Utah should not be reversed in a case on a point on which they have never been called to pass. If this Court does elect to pass upon this matter, counsel suggests that the proper procedure would be to reset the case for oral argument.

## THE UTAH CONSPIRACY STATUTE IS NOT UNCONSTITUTIONAL BECAUSE OF VAGUENESS, INDEFINITENESS OR UNCERTAINTY.

Section 103-11-1, Utah Code Annotated 1943 under which the information in this case was drawn provides as follows:

> "If two or more persons conspire:

(1) To commit a crime; or,

(2) Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or

(3) Falsely to move or maintain any suit, action or proceeding; or

(4) To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or

(5) To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exeeceding $1,000."

According to the terms of the Information the crime is charged specifically under Subsection 5 of that statute. However, the facts as alleged in the Information and the facts as established by the evidence are sufficient also to bring the acts of the defendants within Subsection 1, which holds that it is criminal conspiracy for two or more persons to conspire to commit a crime. Section 103-51-1, Utah Code Annotated 1943, provides as follows:

"Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be punished by a fine or not more than $500, and by imprisonment in the state prison for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known

to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court on the ground of nullity of the marriage contract."

Section 103-1-43, Utah Code Annotated 1943, provides as follows:

"All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen years, lunatics or idiots to commit any crime, and all persons who by fraud, contrivance or force occasion the drunkeness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command or coercion compel another to commit any crime, are principals in any crime so committed.

The information in this case charges that the defendants conspired together "to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:" It is made a crime under the laws of the state of Utah for a person to practice polygamy. The statute of the state of Utah also makes guilty as a principal any person who advises and encourages the commission of a crime. Therefore, in charging

that the defendants conspired together to advise and encourage others to engage in the practice of polygamy, the Information has charged that the defendants conspired together to commit a crime and so there is a proper charge under Subsection 1 of the conspiracy statute as well as under Subsection 5 of that statute.

Certainly it cannot be maintained that Subsection 1 of the conspiracy statute is vague or ambigous. It makes punishable as a crime conspiracy to commit any crime. In order to determine just what a crime is under the laws of the state of Utah one has only to refer to the statutes of the state defining criminal actions. In this case the crime in question is polygamy. There is nothing uncertain or ambigous about Section 103-51-1, Utah Code Annotated 1943. It defines the crime of polygamy with great particularity and any person who can read and understand the English language is fully advised by the statutes of the state of Utah that for a person to marry again while he or she still has a living spouse undivorced is guilty of polygamy. Section 103-1-43, supra, clearly informs anyone that reads that statute that one who advises another to commit polygamy is, himself, guilty as a principal in the commission of the crime. With this in mind can it be doubted that Section 103-11-1, Utah Code Annotated 1943, fully advises any one that reads the same that they are guilty of the crime of conspiracy if they conspire together to advise and encourage others to enter into the practice of polygamy?

The Information does not specify that it is being drawn under Subsection 5 of the conspiracy statute. It merely alleges that it is being drawn generally under Section 103-11-1, supra, which includes Subsection 1 as well as Subsection 5. Let us assume that the Information, instead of reading "to commit acts injurious to public morals as fol-

lows, to-wit" had merely read "to commit the following acts, to-wit." Certainly then it would be a proper charge under either Subsection 1 or Subsection 5. In view of the fact that the allegations of fact contained in the information are sufficiently broad to charge a conspiracy to commit a crime, counsel respectfully urge upon the Court that the defendants were fully advised by the statutes of the state of Utah that it was unlawful to conspire together to urge the commission of the crime of polygamy and were fully advised by the Information as to the charge against them at the time they were brought to trial.

Let us suppose, however, that the charge is not properly laid under Subsection 1 of the conspiracy statute but is brought solely under Subsection 5. Counsel still urges that the conviction should be sustained in this case. At the time this case was argued before the Court it was suggested that this statute might fall within the holding of the Court in the case of United States vs. L. Cohen Grocery, 255 U. S. 81, in which certain provisions of the Lever Act were declared unconstitutional on the grounds that they were indefinite and uncertain. An important distinction exists between the case now before the Court and the Cohen Grocery case. The Lever Act was a federal statute. This Court, as the highest federal Court, was the final authority as to the interpretation of the Lever Act as well as the final authority as to whether such act was in contravention of the Constitution of the United States. In the case now before the Court we are concerned with a state statute and while this Court is the final authority as to whether or not such statute is in contravention of the Constitution of the United States, the Supreme Court of the State of Utah is the highest tribunal having the power to interpret a statute of the state of Utah. Therefore, in determining whether or not a

state statute is in contravention of the Constitution of the United States, this Court should consider not merely the language of the state statute standing alone but also the interpretation placed upon that statute by the highest court of appeal of the state.

This case falls not within the terms of the Cohen Grocery case but rather squarely within the holding of the case of Fox v. Washington, 236 U. S. 273. In the case of Fox v. Washington a statute in some respects similar to the Utah conspiracy statute was being challenged before this Court on the same grounds raised here. The Washington statute provided:

> "Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

Certainly that statute is fully as broad, indefinite and uncertain as is the Utah conspiracy statute. However, in passing upon its constitutionality this court considered not only the terms of the statute but the interpretation placed upon that statute by the Supreme Court of the State of Washington. The language of the Court in this regard is as follows:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; United States v. Delaware & Hudson Co., 213 U. S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as

confined to encouraging an actual breach of law. Therefore, the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it-an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point."

In construing the Utah conspiracy statute, the Supreme Court of the State of Utah has used language strikenly similar to that quoted above in the case of Fox v. Washington. I quote from the decision on this case in the court below, recorded at 175 Pac. 2d 731:

"Article III of our State constitution prohibits plural or polygamous marriages. Statutes enacted pursuant thereto, Secs. 103-51-1 and 2, Ut. C. A. 1943, makes felonious both the practice of polygamy and cohabitation of a man with more than one woman. Such relations are regarded by the law as meretricious. Conduct which induces people to enter into such felonious meretricious relationships, is certainly conduct injurious to public morals. Defendants, however, contend that if a conspiracy could be charged for expression of beliefs and ideas, then every effort to change some obnoxious law or some objectional constitutional provision could be thwarted by a conspiracy charge. There is a vast distinction between advocating a change in the law by appropriate legislation, and urging people to commit acts in violation of the law. Advocating violation of law is not an equivalent of urging repeal of the law."

Counsel for the state cannot deny that Subsection 5 of the Utah conspiracy statute is so broad in its language that if interpreted in the fullest and broadest extent consistent with the meaning of the language contained therein would be in violation of the due process clause of the federal constitution. However, in so far as this case is concerned it has been interpreted by the Supreme Court of the State of Utah to extend only to the extent of encouraging others to enter into "felonious meretricious relationships." Certainly, as the Court points out, such acts are contrary to good public morals and it is inconceivable that the minds of fair and logical men could differ as to whether or not such conduct was actually contrary to good public morals.

Again counsel wishes to urge that this point be not considered in the decision of this case but that if it is considered, the case be reset for argument before the Court.

Respectfully submitted,

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